

No. 4503

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**United States Circuit Court  
of Appeals**

**For the Ninth Circuit 9**

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FRED MERRILL,  
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error

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**Supplement to Transcript of Record**

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Upon Writ of Error to the District Court of the  
United States for the District of Oregon

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FILED

APR 3 - 1915

F. B. MONTGOMERY

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SUPPLEMENT TO BILL OF EXCEPTIONS

In the District Court of the United States for the  
District of Oregon

UNITED STATES OF AMERICA,  
Plaintiff

FRED T. MERRILL,  
Defendant

It appearing, that heretofore and in the course of the revision of the Bill of Exceptions, and in the compilation of the Amended Bill of Exceptions, thereafter and on the 10th day of January, 1925, settled and allowed, as and for, a Bill of Exceptions in the above entitled cause, there was, through inadvertence and excusable neglect, a certain portion of the testimony of the witness Ruth Meade omitted therefrom, and that said portion of the testimony of the witness was and is omitted from the Bill of Exceptions as printed in the transcript of record herein, and that the same should have been entered on page 24 of the Bill of Exceptions, at page 102 of the Transcript of Record herein, and immediately preceding the following: "COURT: 'You are asking that question?'"

It is hereby stipulated and agreed, by and between the respective parties acting through and by their undersigned attorneys, that the testimony of the witness Ruth Meade, appended hereto, may be by reference added to and incorporated into the

Bill of Exceptions, and that the same may be considered upon appeal herein as though the same were incorporated in the Bill of Exceptions in its proper position.

J. O. STEARNS, JR.,

Of Attorneys for Plaintiff in Error.

BARNETT H. GOLDSTEIN,

Attorney for Defendant in Error.

Q. Well, then, for the purpose of refreshing your recollection, I will ask you if you didn't state—for the purpose of impeachment, I will ask the following question, if you didn't testify on May 29th, just nineteen days after this alleged occurrence, the following, in the presence of Cloyd D. Rauch, a court reporter in Judge Hawkins' court room, the following testimony:

Mr. Bynon: This is another case, Your Honor—has reference to another case. I object to the question. I object to his reading from any transcript in any other case.

Mr. Goldstein: This is an impeaching question as to what took place that afternoon of May 10th.

Court: Go ahead. See what it is.

The following questions were asked and the following answers given:

Q. Well, I ask you again what was your definite duty in this plan of operation?

A. To help get evidence.

Q. Who told you to do that?

A. That is what I was sent for.

Q. Who told you to do that?

A. Sheriff Hurlburt.

Q. Did he himself tell you?

A. Yes.

Q. Did he give you instructions?

A. He gave us instructions, and later through Mr. Gates.

Q. He gave you instructions?

A. Yes, sir.

Q. And when did he give you those instructions?

A. He gave me those instructions in the afternoon.

Q. Of May 10th?

A. Yes, sir.

Q. Where?

A. At his office.

Q. Who else were present?

A. Mr. Gates and Mrs. Johnson.

Q. Three of you employes?

A. Yes, sir.

Q. Now, what were the instructions that the sheriff gave you?

A. We were to get evidence from these houses.

Q. How were you to get the evidence?

A. In a party of three.

Q. How were you to get the evidence?

A. To buy it.

Q. How?

A. To buy it.

Q. Well, what were you supposed to do?

A. We were supposed to go out there in a party and buy this evidence.

Q. Were you supposed to go out with whisky?

A. If we had to.

Q. Were you supposed to go out with whisky?

A. If we had to, yes.

Q. Were you supposed to go out with whisky?

A. When we had to."

Mr. Bynon: Object to.

Court: What was that last that you read there?

Mr. Goldstein: "Were you supposed to go out with whisky?" A. "If we had to, yes."

Q. "Were you supposed to go out with whisky?" I repeated the question: A. "When

we had to." Q. "Well, did you go with whisky on an expedition. A. "Sometimes." Q. "Well,

who furnished you with the whisky?" A. "Mr. Gates bought it." Q. "Well, Mr. Gates would

start out on a trip with whisky?" A. "Yes, some of the time." Q. "How many times?"

A. "I don't know how many times." Q. "What was the idea of taking whisky in a taxicab?"

A. "For this reason, if you want to know." Q. "That is what I am asking you." A. "Because

with this on our breath; we took it to our lips—the reason was so we could walk in these places, they wouldn't think we had come from some office."

Court: Are you going to read that whole testimony?

Mr. Goldstein: No, just four more lines.

Mr. Bynon: I object to the reading of this

transcript. Counsel has tried to inject this in the record all the way through in this case. I don't think it belongs here. We are trying this one particular case.

Court: This is for the purpose of impeachment.

Mr. Bynon: Your Honor, why read an entire transcript for the purpose of impeachment as to one thing?

Court: That is what I was inquiring into, whether he was going to read that entire transcript.

Mr. Goldstein: I am not. Just as to the conversation that one afternoon as to the plan of operation.

Court: All right. Go on. Complete what you intend to read.

Mr. Goldstein: Q. "That was the reason. And the other reason was that, when the taxi driver had a drink he told us a good many things and took us a good many places." Q. "That was for the purpose, first, of yourself giving an atmosphere of intoxication when you approached the place?" A. "More or less." Q. "Second, for the purpose of intoxicating and inebriating the taxicab driver to make him look—" A. "We didn't give him enough to make him intoxicated." Q. "Just to make him talkative?" A. "Yes." Q. "So there were two reasons: First, to give yourself an atmosphere of intoxication?" A. "Yes, sir."

Court: That is going too far with that. You are reading that whole testimony into this case. This is for the purpose of impeachment. You

have read two pages there. You are going to ask the witness whether she testified to those two pages?

Mr. Goldstein: Yes.

Court: Then ask her the question.

Mr. Stearns: I would like to suggest this objection: This testimony all went to a subsequent investigation. It had nothing at all to do with this particular case. I am going to ask your Honor to instruct the jury that, so far as that testimony indicated a plan different from the plan—

Court: I understand that this testimony was given in another case?

Mr. Goldstein: Yes, your Honor.

Court: It doesn't have relation to this case at all?

Mr. Goldstein: Except in so far as it shows what her plan of operation was on the afternoon of May 10th.

Court: The objection will be sustained. The court has been misled.

Mr. Goldstein: May I make a statement for the record? This evidence is for the purpose of impeaching the witness as to what took place on the afternoon of May 10th. If your Honor will recall, prior to laying the impeachment question, presenting it to the witness, I asked her whether there was any conference had in the afternoon of May 10th, at which there were present Mrs. Johnson, the sheriff and herself. And she stated no; that the only conference in the afternoon of May 10th was when Mr. Christofferson came to her office with Mr.



Gates, and that she did not see Mrs. Johnson until the night of May 10th. I asked her what were the definite plans of operation discussed or whether there was any specific instruction. She stated the only instruction she received was from Mr. Christoffersen. I am asking her if she did not, at a certain time and certain place, state that on the afternoon of May 10th, which was the afternoon I had been talking with her about, she did not at some certain place, naming the place where she said it, the persons in whose presence she said it, make the following statement, which is contradictory to what she stated, and which is along the line of the theory of the defense. Now, I think I have a perfect right to ask her if she did not make contradictory statements. It doesn't make any difference where she said it, or to whom she said it, if it is contrary to what she said now.

Court: If you are asking this witness as to what was said on the afternoon of May 10th by Mr. Christoffersen or Mr. Hurlburt to her, confine yourself to that time.

Mr. Goldstein: I am; I am asking her all along about the plan of operation that took place on the afternoon of May 10th, as to what they were supposed to do.

Court: Give me that testimony.

Mr. Goldstein: Yes, your Honor. (Hands testimony to court.)

#### EXAMINATION BY THE COURT

Q. Did Mr. Christoffersen give you instructions that afternoon or that day?

A. Yes, he did that afternoon.

Q. Well, now, did those instructions apply to any particular roadhouse?

A. Those instructions that Mr. Christoffersen gave us in the afternoon for whatever roadhouse we visited.

Q. Well, did they apply to any particular roadhouse?

A. No; they would apply to all of them.

Q. Did he instruct you as to what you were to do in going out to the Twelve Mile House?

A. Well, those instructions he gave us were were general, as I understood it, for all of them.

Q. They were general?

A. Yes, sir.

Court: You may ask as to this, starting with question on page 95, and reading, "Well, I will ask you again" down to the question, "Were you supposed to go out with whisky?

A. When we had to," at the top of page 97. I am not going to open up this whole matter on a side issue. You may ask her that as an impeaching question.

Q. I will ask you, Miss Meade, if you did not, on May 10th, 1923, just nine days after this alleged occurrence, in Judge Hawkins' court room in the county court house, Portland, in the presence of Cloyd D. Rauch, a court reporter, and others, give the following testimony: "Q. Well, I ask you again what was your definite duty in this plan of operation?

A. To help get evidence. Q. Who told you to do that? A. That is what I was sent for.

Q. Who told you to do that? A. Sheriff Hurl-

burt. Q. Did he himself tell you? A. Yes, sir. Q. Did he give you instructions? A. He gave us instructions, and later, through Mr. Gates. Q. He gave you instructions. A. Yes, sir. Q. And when did he give you those instructions? A. He gave me those instructions in the afternoon. Q. Of May 10th? A. Yes, sir. Q. Where? A. At his office. Q. Who else were present? A. Mr. Gates and Mrs. Johnson. Q. Three of you employes? A. Yes, sir. Q. Now, what were the instructions that the sheriff gave you? A. We were to get evidence from these houses. Q. How were you to get the evidence? A. In a party of three. Q. How were you to get the evidence? A. To buy it. Q. How? A. To buy it. Q. Well, what were you supposed to do? A. We were supposed to go out there in a party and buy this evidence. Q. Were you supposed to go out and drink whisky? A. If we had to. Q. Were you supposed to go out with whisky? A. If we had to, yes. Q. Were you supposed to go out with whisky. A. When we had to.”

Mr. Goldstein: Your Honor rules I cannot proceed further?

Court: That is as far as you may go.

Mr. Goldstein: May I take an exception?

UNITED STATES OF AMERICA )  
DISTRICT OF OREGON. )

Because of the matters and things set forth in the foregoing stipulation, and because the foregoing testimony should be a part of the Bill of Exceptions

herein, the foregoing stipulation and Supplement to Bill of Exceptions is hereby approved at Portland, Oregon, this 25th day of March, 1925.

CHAS. E. WOLVERTON,  
United States District Judge.

UNITED STATES OF AMERICA )  
DISTRICT OF OREGON. )

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have compared the foregoing Supplement to Bill of Exceptions with the original thereof, and that the foregoing Supplement to Bill of Exceptions, in the case in which Fred T. Merrill is defendant and plaintiff in error, and the United States of America is plaintiff, and defendant in error, is a full, true and correct transcript of the original thereof, as the same appears of record in my file and in my custody.

And I further certify that the fee for certifying to the within Supplement to Bill of Exceptions, to-wit, the sum of \$..... has been paid by the plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this.....day of March, 1925.

.....  
Clerk of the District Court of the United States,  
in the District of Oregon.